

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LINDSEY D. WELLS,

Plaintiff

V.

NO. 3:94CV128-B-D

LAFAYETTE COUNTY CIRCUIT
COURT JUDGE LACKEY,

Defendant

O P I N I O N

This matter is before the court, sua sponte, for consideration of dismissal of this cause. Plaintiff, an inmate currently incarcerated at the Mississippi State Penitentiary, files this complaint pursuant to 42 U.S.C. §1983. The defendant is Circuit Court Judge Lackey of Lafayette County. Plaintiff seeks monetary damages and to have his charges dismissed.

Plaintiff states that on June 24, 1994, he was tried before a jury in LaFayette County and was found not guilty. However, he alleges that the defendant then "looked at the foreman of the jury and she said they made a mistake on the verdict and Judge Lackey

sent the jury back in the chambers and they came back out with a guilty verdict . . . "

After carefully considering the contents of the pro se complaint and giving it the liberal construction required by Haines v. Kerner, 404 U.S. 519 (1972), this court has come to the following conclusion.

In Jackson v. Torres, 720 F.2d 877, 879 (5th Cir. 1983), the court held that any challenge to the fact or duration of a prisoner's confinement is properly treated as a habeas corpus matter, whereas challenges to conditions of confinement may proceed under Section 1983. Johnson v. Hardy, 601 F.2d 172, 174 (5th Cir. 1979). The relief sought by the prisoner or the label he places upon the action is not the governing factor.

Clearly, the plaintiff is challenging the fact of his confinement and not the conditions of confinement. Consequently, this action will be treated as a habeas corpus matter.

It is well settled that a state prisoner seeking habeas corpus relief in federal court is first required to exhaust his available state remedies. 28 U.S.C. §2254(b) and (c)¹; see also Rose v.

¹ 28 U.S.C. §2254(b) and (c) provide:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted

Lundy, 455 U.S. 509 (1982). More specifically, a petitioner must present his claims to the state courts in such a fashion so as to afford those courts a fair opportunity to rule on the merits. Picard v. Conner, 404 U.S. 270 (1971); Dispensa v. Lynaugh, 847 F.2d 211, 217 (5th Cir. 1988). A habeas corpus petitioner must provide the state's highest court with a fair opportunity to pass upon the issues raised in the petition for federal habeas corpus relief. Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir. 1988) (citing Carter v. Estelle, 677 F.2d 427, 443-44 (5th Cir. 1982)).

Plaintiff has the right to direct appeal of his conviction to the Mississippi Supreme Court. Miss. Code Ann. §99-35-101 et seq. (1992 Supp.). Additionally, he has another available state remedy under the Mississippi Post-Conviction Collateral Relief Act, Miss. Code Ann. §§99-39-25, et seq. (1992 Supp.). If plaintiff does not receive the requested relief, he may appeal that decision to the Mississippi Supreme Court. Miss. Code Ann. §99-39-25 (1992 Supp.)

the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Once plaintiff has exhausted his available state remedies and in the event he does not receive the requested relief, he may then file a petition for habeas corpus relief in this court presenting the same grounds in his federal petition for relief as he did to the state courts.

A final judgment in accordance with this opinion will be entered.

THIS the _____ day of _____, 1994.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE